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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-846

JOHN W. WINGO, WARDEN
KENTUCKY STATE PENITENTIARY
EDDYVILLE, KENTUCKY ..... PETITIONER

vs.

CARL JAMES WEDDING ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit (App. 61) is reported as *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir. 1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on August 31,

1973 (App. 61). The petition for writ of certiorari was filed on November 23, 1973, and was granted on January 21, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Magistrates Act, 28 U.S.C. § 631, et seq., empowers a United States Magistrate to hold evidentiary hearings involving relief under 28 U.S.C. § 2241, et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is Article III of the United States Constitution which vests the judicial power of the United States.

The statutes involved here are 28 U.S.C. § 2241, et seq., the statutory codification of Federal Habeas Corpus; and 28 U.S.C. § 631, et seq., the Federal Magistrates Act, and particularly 28 U.S.C. § 636 (b).

STATEMENT OF THE CASE

Respondent, Carl James Wedding, hereafter "Mr. Wedding", is currently serving a life sentence imposed in 1949 by the Webster Circuit Court, Commonwealth of Kentucky, after entry of a plea of guilty to murder.

Pursuant to Rule 11.42, Kentucky Rules of Criminal Procedure, Mr. Wedding, in 1970, filed a motion to vacate this sentence in the Webster Circuit Court

which was denied without a hearing. That order was affirmed by the Kentucky Court of Appeals, *Wedding* v. *Commonwealth*, Ky., 468 S.W.2d 273 (1971).

Thereafter, Mr. Wedding, pro se, filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky, pursuant to provisions contained in 28 U.S.C. § 2241, et seq. The District Court entered an order dismissing the petition. Mr. Wedding appealed that order to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit reversed the decision of the lower court and remanded the matter to the District Court stating that "the petition for habeas corpus presents issues of fact requiring an evidentiary hearing" (App 11).

Pursuant to Rule 16(c)(3), Rules of the United States District Court for the Western District of Kentucky, the District Court assigned the matter of the evidentiary hearing to the full-time magistrate and appointed the Honorable Joseph G. Glass to represent Mr. Wedding (App. 13). Prior to the holding of the evidentiary hearing, Mr. Wedding moved to disqualify the magistrate from holding such hearing on the grounds that the magistrate was not empowered to hold evidentiary hearings under authority of the Federal Magistrates Act, 28 U.S.C. § 631, et seq. That motion was overruled by the District Court (App. 15, 28).

An evidentiary hearing was held on June 26, 1972, before the magistrate, sitting specially at Dixon, Web-

ster County, Kentucky (App. 34). Thereafter, the magistrate provided the District Court with his Findings of Fact and Conclusions of Law and his Report and Recommendation which recommended to the District Court that Mr. Wedding's petition be dismissed (App. 40, 41).

Mr. Wedding, pursuant to Rule 16(c)(3), Rules of the United States District Court for the Western District of Kentucky, requested that the District Court consider the matter de novo (App. 50).

The District Court, after considering all the pleadings in the case and having read the magistrate's Findings of Fact and Conclusions of Law and his Report and Recommendation thereon and having heard the recorded testimony of the evidentiary hearing and giving it de novo consideration, adopted the magistrate's Findings of Fact and Conclusions of Law as his own and entered an order dismissing Mr. Wedding's petition for writ of habeas corpus (App. 59).

Mr. Wedding appealed the District Court's order to the Sixth Circuit. The Sixth Circuit once again reversed the decision of the District Court by vacating the judgment of dismissal and remanded the case with instructions that the District Court itself hold an evidentiary hearing on Mr. Wedding's constitutional claims, *Wedding* v. *Wingo*, 483 F.2d 1131 (6th Cir 1973) [App. 61]. It is from this order that a review is sought.

ARGUMENT

THE FEDERAL MAGISTRATES ACT, 28 U.S.C. § 631 ET SEQ., EMPOWERS A UNITED STATES MAGISTRATE TO HOLD EVIDENTIARY HEARINGS INVOLVING RELIEF UNDER 28 U.S.C. § 2241, ET SEQ.

Magistrates are empowered to conduct evidentiary hearings on habeas corpus petitions by Section 636(b) of the Federal Magistrates Act. This section, 28 U.S.C. § 636(b), provides:

> "*Any district court of the United States by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate* or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, *may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States.* The additional duties authorized by rule *may* include, *but are not restricted to* —
>
> "(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> "(3) ***preliminary review*** of applications for posttrial relief made by individuals convicted of criminal offenses, ***and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over***

the case as to whether there should be a hearing." (Emphasis added.)

Thus, Section 636(b) authorizes the district court to establish rules from which the magistrates may be assigned additional duties as long as these duties are not inconsistent with the Constitution and the laws of the United States.

Section 636(b)(3) clearly gives magistrates the power to conduct a preliminary review of habeas corpus applications and to submit a report and recommendation as to whether there should be a hearing. See *Noorlander* v. *Ciccone*, ____F.2d____ (8th Cir. filed December 27, 1973), which was decided subsequent to the filing of the petition for certiorari in the instant case.

It is further submitted that the three additional duties which Congress set forth in 28 U.S.C. § 636(b), subsections (1), (2), and (3), were suggested duties, not required duties. For this reason, these suggested additional duties cannot be reasonably interpreted to be "exclusive on the topics which they cover" as the Sixth Circuit held them to be under the theory of ejusdem generis. *Wedding* v. *Wingo*, 483 F.2d 1131 at 1135 (6th Cir. 1973). A sectional analysis of the Federal Magistrates Act in H.R. Rep. No. 1629, 90th Cong., 2d Sess. (1969), as quoted in U.S. CODE CONG. & AD. NEWS at 4262 (1969), states:

"Proposed 28 U.S.C. 636(b) mentions three categories of functions assignable to magistrates under its provisions. *The mention of these three categories is intended to illustrate the general char-*

acter of duties assignable to magistrates under the act, *rather than to constitute an exclusive specification of duties so assignable.*" (Emphasis added.)

In view of this broad and not restrictive listing of additional powers and duties under § 636(b), it is readily apparent from a review of the hearings of the Subcommittee On Improvements in Judicial Machinery, that the magistrates would be empowered to conduct preliminary hearings in posttrial relief cases made by individuals convicted of criminal offenses. Such intent is evidenced in the following statements of Senator Joseph D. Tydings, chairman of the subcommittee:

"Senator TYDINGS. You don't think that the judge, particularly in one of the tremendously burdened courts, has time to read and laboriously go through every handwritten page of these postconviction petitions?

Mr. VINSON. I would suggest that he have someone translate and decipher for him

Senator TYDINGS. He has got to have someone boil down the petition and prepare a memorandum for him on the facts and law involved. It is a physical impossibility for the judges, not only at the district court level, but at the circuit court of appeals level, to do everything — from deciphering the petition to the decision.

Mr. VINSON. But that is a function that I understand is now performed generally by law clerks where the judge is involved on these hearings under 2255.

Senator TYDINGS. In some places the judges have to do it themselves, too, if they don't have law clerks that have been with them long enough to de-

velop an expertise so that the judges have sufficient confidence in them.

Mr. VINSON. I assume that the committee would not intend that the 2255 hearing actually be held by a magistrate.

"Senator TYDINGS. We wouldn't intend for the final decision to be made by the magistrate. But we would intend that if the magistrate could hold a preliminary hearing, so to speak, or could review the documents and give a memorandum to the judge so that the judge could make the final decision based on the nature of discovery proceeding or review of petition by the magistrate. We certainly intend that. We intend this to lift off the shoulder of the judges as much of the routine nature of discovery or fact-finding operation connected with post-conviction procedure and petitions as possible.

Mr. VINSON. So that there can be no confusion, we have no quarrel with whether the clerical work, the deciphering work, the summarizing work, is done by a law clerk or by a magistrate.

Senator TYDINGS. And the discovery part of it, that is, the determination of whether or not there was any foundation for the allegations by the individual petitioner that the district court was bribed, the U.S. attorney was bribed. I don't know how much experience you have had with some of these petitions, but I can assure you that they are pretty outlandish at times. And much of it requires steady work and digging in to determine what the facts are. Of course, the judge has to make the final decision. But insofar as the petition requires work in the nature of digging in for the facts and, if necessary, holding plenary hearings, and calling in the petitioner him-

self and taking testimony from him, we feel that this is an area which the magistrate can well handle.

Mr. VINSON. I would beg to differ in that I would think the magistrate would not have the power to hold the hearing.

Senator TYDINGS. For purposes of discovery?

Mr. VINSON. I argued the case in the Supreme Court of *United States* v. *Sanders*, which is the guideline decision on the right of a defendant to a hearing by a judge on a 2255 application. And I feel that the only argument you could make that would allow a magistrate rather than an article III judge to hold that hearing would be that it is a civil proceeding.

Senator TYDINGS. Well, it is a civil proceeding.

Mr. VINSON. It is labeled as such. However, 2255 is, of course, the Federal habeas corpus proceeding.

That is the great writ.

Senator TYDINGS. You don't dispute that it is a civil proceeding, do you?

Mr. VINSON. It is labeled civil. It is on the civil docket of the district court.

Senator TYDINGS. Do you or don't you dispute that it is a civil proceeding?

Mr. VINSON. I think it is a mixture, Mr. Chairman.

Senator TYDINGS. Then you say it is not a civil proceeding?

Mr. VINSON. I think it is a mixture. It is labeled as civil, but it has definite criminal overtones.

It involves whether a man should be released from incarceration for a crime.

Senator TYDINGS. A what point would you prohibit the magistrate from acting in a post-conviction procedure case?

Mr. VINSON. I don't believe that the magistrate could hold the hearing and make findings of fact in this matter.

Senator TYDINGS. What about the review of the decision itself and the wirting (sic) of memorandum for the judge as to the validity of it? Don't law clerks do that?

Mr. VINSON. I think the judge could have anyone that he wished do that, Mr. Chairman.

"Senator TYDINGS. Do you think that it would be all right for the magistrate to review the facts of the petition and make a recommendation to the judge that he felt it was without validity? But as I understand your testimony, you say the magistrate couldn't hold a hearing and have people come in and testify and then say that he felt that on the basis of the hearing the statements made by the petition would not hold water or were not factual?

What is the difference?

Mr. VINSON. I think that is the exercise of judicial power.

Senator TYDINGS. Are you familiar with the case of *Crowell* v. *Benson*. 258 U.S. 22?

Mr. VINSON. Generally, yes.

Senator TYDINGS. Do you recall that there the Supreme Court said that, in order to maintain the essential attributes of judicial power, all determina-

tions of fact in a constitutional court need not be made by judges?

Mr. VINSON. Yes. But I also believe that the Court said that he had a de novo right of review in the district court in such case.

Senator TYDINGS. We don't propose here — we say that the judge has to make the final decision. We say that the magistrate should be able to assist him to the point of holding plenary, discovery hearings. Now, what happens now as a practical matter, you get no hearings. The law clerk reviews the papers. If he is a good law clerk, fine, he make a recommendation. And generally the judge takes it. So we are giving the individual prisoner actually an opportunity — or petitioner — for more consideration than he gets now. And yet you say that you don't think magistrates should be able to hold the hearing. They could do everything except have a hearing, even to the point of recommending it to the judge.

Mr. VINSON. Mr. Chairman, I am not directing my comments at the desirability of this. But I think it would be desirable to devise some way to relieve the U.S. district court judges of what has become and is becoming an increasing burden, the post-conviction motions for relief.

I think you would equate it with the reference to a master or to an auditor in a civil matter.

Senator TYDINGS. I still think that section 2255 is a civil proceeding as Congress has labeled it. But you obviously disagree..

Mr. VINSON. I think it is a mixture, Mr. Chairman.

* * *

Hearings on S. 3475 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (July 12, 1966) [Senate Hearings, 112-114]

Moreover, allowing the magistrate to conduct an evidentiary hearing on a habeas corpus petition is not inconsistent with the Constitution or statutes of the United States.

In this regard, argument has been made that magistrates cannot hold evidentiary hearings because they do not fall within Article III of the Federal Constitution which vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and that due process of law encompasses the right of litigants to have cases or controversies determined by Article III judges. See *TPO, Incorporated* v. *McMillen*, 460 F.2d 348 at page 353 (7th Cir. 1972).

It is conceded that magistrates do not have authority *to decide or to make ultimate determination of fact, cases or controversies.* This must be left to the Article III courts, such as Federal District Courts.

However, we submit that the purposely broad language that Congress set out in the Federal Magistrates Act authorizes the federal courts to establish rules assigning duties to the magistrate to conduct evidentiary hearings and to submit *proposed* findings of fact and conclusions of law and his recommendation thereon. In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the

Federal Judge to hear the testimony and give it de novo consideration as the petitioner, in this case, requested.

The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate.

In addition, the Eighth Circuit in *Noorlander* v. *Ciccone*, supra, in discussing § 636(b) stated:

> ". . . To summarize, we do not believe the statute prohibits magistrates from holding hearings in habeas corpus matters if a full opportunity is given for a de novo hearing before an Article III judge in the event that dispute as to a material issue of fact develops during the course of a hearing and if the final decision-making power is retained in the court.
>
> "We are convinced that no constitutional provisions are violated by permitting magistrates to conduct preliminary evidentiary hearings in habeas corpus matters provided, of course, that the judge retains and *exercises* the decision-making power with respect to the law and the facts. Rule 26 reserves these powers to the court, with the exceptions hereinafter noted. The rule provides the court with a convenient, quick and efficient method of sorting out the legal and factual issues. It goes further than some rules in giving the magistrate the right to conduct evidentiary hearings, but the hearings are essentially preliminary in nature and designed to assist the trial court in reaching an early and proper result. The rule does not confer the judicial power of the United States to decide cases on someone other than an Article III judge.

"Nor does the rule, with the exceptions hereinafter noted, violate the due process right of a litigant to have his case heard by an Article III judge. A petioner is always entitled to take exceptions to material issues of fact and conclusions of law. If he takes exception to the former, an Article III judge "will personally take the testimony of the witnesses, determine their credibility and decide for himself what the facts are. If the exceptions are only as to conclusions to be drawn from undisputed material facts, the judge will again decide for himself what the proper procedure is. As we see the rule, it takes one short but important step beyond those already taken by most courts. It permits a magistrate to go beyond the pleadings and records, and to conduct an evidentiary hearing to determine whether there are in fact disputed material issues of fact. If there are some, he can point them out and make *preliminary* findings. If there are none, he can so find. It seems to us that this procedure, if carefully followed, can help the petitioners achieve a prompt and a fair determination of the rights by an Article III judge." [Emphasis in the original]

Thus, none of the habeas corpus applicant's constitutional rights are violated by the magistrate conducting an evidentiary hearing so long as the ultimate determination is made by the Article III judge and the opportunity exists for de novo consideration as was the situation in the case at bar.

The Sixth Circuit in this case held that magistrates could not conduct evidentiary hearings on habeas corpus applications. In support of its position, the Sixth Circuit relied upon *Holiday* v. *Johnston,* 313 U.S. 342, 85 L.ed 1392, 61 S.Ct. 1015 (1941). In *Holiday,* this Honorable Court held that a United States Commissioner was with-

out authority to hold evidentiary hearings on habeas corpus petitions. However, *Holiday* was decided before enactment of the 1968 Federal Magistrates Act. The Eighth Circuit stated in *Norrlander*, supra, as follows:

> "Finally, we do not read *Holiday* v. *Johnston*, 313 U.S. 342 (1941), as holding the Constitution prohibits magistrates from conducting evidentiary hearings in all habeas corpus matters. We rather read that case as indicating that the statute being construed by the Court at that time did not permit commissioners to conduct evidentiary hearings in habeas corpus matters. **We deal with a different statute here.**"

In noting the difference between the proposed Federal Magistrates Act and the existing United States Commissioner statute, Senator Tydings, from the floor of the Senate, stated:

> "The bill reflects the virtually unanimous conclusion of these witnesses that the present U.S. commissioner system is inadequate to meet the demands of a modern system of justice, and that drastic reforms are needed promptly."
>
> * * *
>
> ". . . At an early stage it became evident that we must choose one of two routes: first, to downgrade the system and relegate the commissioners to the performance of ministerial functions, transferring to the district judges the bulk of the duties now performed by commissioners; or second, to upgrade the commissioner in stature, qualifications, and compensation, making him equal to the important judicial tasks that he currently must perform, and giv-

ing him important new functions in the administration of criminal justice."

* * *

"The bill, therefore, is predicated on the fundamental assumption that the commissioner system should be upgraded, making it capable of discharging effectively the duties we presently call upon it to perform, and of undertaking new functions to relieve the district judges of some of their burden."

113 Cong Rec. 3242, 3243 (1967).

As a result of the passage of the Federal Magistrates Act, the title of the office was changed from United States Commissioner to United States Magistrate. All magistrates were required to be attorneys unless it was impossible to find a qualified attorney. Magistrates were paid fixed salaries rather than on a fee system. Full time magistrates were given secure eight-year terms, subject to removal only for cause. See discussion of legislative history in *TPO, Incorporated,* supra, at page 351.

We, therefore, submit that *Holiday* is not controlling over the provisions under the Federal Magistrates Act nor the instant case.

CONCLUSION

For the foregoing reasons, the Federal Magistrates Act empowers magistrates to conduct evidentiary hearings and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Ringo, one of counsel for petitioner, hereby certify that the foregoing Brief for Petitioner was served on respondent by depositing three copies of same in the United States mail, first class postage prepaid, on March 5th, 1974, addressed to counsel for respondent, Honorable Joseph G. Glass, 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202.

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